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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 117

RICHARD V. JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 138–140) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 9, 1945 (R. 141). The petition for a writ of certiorari was filed June 7, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's convictions for carrying on the business of a wholesale liquor dealer without paying the special tax required by law.

2. Whether it was proper for the trial court to instruct the jury that copies of records filed by persons other than petitioner with the Alcohol Tax Unit did not constitute proof of the substantive facts contained therein.

3. Whether the trial court erred in not granting a mistrial on its own motion after the jury reported disagreement.

4. Whether the separate counts of the indictments returned against petitioner, each charging the carrying on of a wholesale liquor business at a different time and place, were based on separate offenses.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Internal Revenue Code, as amended (26 U. S. C.), are:

> § 3250. *Tax*—(a) *Wholesale dealers in liquors.*
>
> (1) *In general.*—Wholesale dealers in liquors shall pay a special tax of $110.
>
> * * * * *
>
> § 3253. *Penalties and forfeitures for nonpayment of special tax.*
>
> Any person who shall carry on the business of a * * * wholesale liquor dealer, * * * and willfully fails to pay

the special tax as required by law, shall, for every such offense, be fined not less than $100 nor more than $5,000 and be imprisoned for not less than thirty days nor more than two years. * * *

§ 3254. (b) *Wholesale dealer in liquors.* Except as otherwise provided, every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors in quantities of five wine-gallons or more to the same person at the same time, shall be regarded as a wholesale dealer in liquors: *Provided,* That the Commissioner may, by regulations, with the approval of the Secretary, provide for the issuance of a stamp denoting payment of such special tax as a "wholesale dealer in wines" or a "wholesale dealer in wines and malt liquors" if, as the case may be, wines only, or wines and malt liquors only, are sold by a wholesale dealer in liquors.

* * * * *

§ 3278. *Liability in case of business in more than one location.*

The payment of the special tax imposed shall not exempt from an additional special tax the person carrying on a trade or business in any other place than that stated in the collector's register; but nothing herein contained shall require a special tax for the storage of goods, wares, or merchandise in other places than the place of business * * *.

Treasury Regulation 20, issued June 6, 1940, 5 F. R. 2170, 26 C. F. R. Cum. Supp. 194.1 ff, provides in pertinent part as follows:

> § 194.28. *Each place of business taxable.* Except as provided in § 194.63,[1] liability to special tax is incurred at each and every place where distilled spirits, wines, or malt liquors are sold or offered for sale.
>
> § 194.29. *Places of storage.*—Special tax is not required to be paid for warehouses and similar places which are used by dealers merely for the storage of liquors and which are not places where orders for liquors are accepted.
>
> § 194.30. *Place of sale or offering for sale.*
>
> (a) The place at which ownership of liquors is transferred, actually or constructively, is the place of sale.
>
> (b) Liquors are offered for sale (1) at the place where they are kept for sale and where a sale may be effected, or (2) at any place where sales are consummated. * * *
>
> * * * * * *
>
> § 194.32. *Peddling.*—Except as set forth in § 194.63, internal revenue laws do not contemplate the peddling of distilled spirits, wines, or malt liquors, nor permit the issuance of any special tax stamp to cover peddling activities. Persons peddling liquors and not meeting the exemption in § 194.63, are subject to special tax at each place where sales are consummated.

[1] This section has no bearing on the litigation.

STATEMENT

On May 9, 1944, three indictments containing a total of five counts were returned against petitioner in the United States District Court for the Southern District of Georgia, charging that, in violation of Section 3253 of the Internal Revenue Code, he carried on the business of a wholesale liquor dealer without having paid the special tax required by law. Each count charged the carrying on of the business at a stated time in a different county or counties in Georgia. (R. 1–2, 4–6, 8–10.) By agreement of counsel the indictments were consolidated for trial (R. 20–21). Petitioner was convicted on all counts (R. 2, 6, 10) and he was sentenced to imprisonment for six months and to pay a fine of $2,000 on each count, the prison sentences to run consecutively (R. 3, 7, 11).

The evidence for the Government may be summarized as follows:

A number of retail liquor dealers in various counties in Georgia testified that they had purchased liquor from petitioner in wholesale quantities at prices above O. P. A. ceiling prices (R. 29–31, 45–46, 47, 50, 60, 69, 72–73, 79–80, 83, 84, 90). In some instances petitioner drove to the customer's place of business with the whiskey and unloaded as much as the customer could use (R. 34, 46, 92). At other times petitioner took orders from customers and delivery

was made by persons hired by petitioner (R. 36, 37, 46, 48–49, 60, 66, 75, 80, 91). Occasionally purchasers would themselves pick up the liquor at a place of storage maintained by petitioner in Savannah (R. 36, 47, 55–56, 69–70, 83–84).

The customers paid petitioner in cash and received no invoices for their purchases (R. 32–34, 37, 49, 61, 63, 69, 71, 76, 82, 85, 90–92). At one time petitioner gave a customer an invoice from a liquor store in Atlanta and told him to show it to any investigator who might come around (R. 35). When the same customers bought liquor from other wholesalers they received invoices and paid ceiling prices (R. 37, 55, 85–86). In a number of instances customers obtained liquor from petitioner after they had been unable to buy it from their regular wholesale dealers (R. 62, 65, 71, 73, 81, 92).

Petitioner told several of these customers that he was in business for himself (R. 33, 50, 74). He did not file the forms and did not pay the tax required by law of wholesale liquor dealers (R. 25–27).

ARGUMENT

1. Petitioner challenges the sufficiency of the evidence to support his convictions (Pet. 3; Br. 5–6, 9–12) on the ground that the Government did not prove that he was acting for himself rather than, as he contended, as agent for wholesale dealers. However, as set forth in the State-

ment, *supra,* several of petitioner's customers testified that he told them he was in business for himself. Moreover, the circumstances that petitioner's customers obtained liquor from him when they were unable to buy it from wholesalers he allegedly represented, that in most instances deliveries were made by persons hired by petitioner, and that payments were made in cash directly to petitioner, all warranted the jury in inferring that petitioner was acting in his own behalf as a wholesaler.

2. The only evidence introduced by petitioner on his own behalf was records filed by four wholesale liquor concerns with the Alcohol Tax Unit, pursuant to Section 2857 of the Internal Revenue Code (R. 100–108). These records listed sales by the four concerns to witnesses who had testified that they had purchased liquor from petitioner (R. 100–108). Most of the witnesses had testified that they had made no purchase of liquor from any of the four concerns other than the Savannah Distributing Co. (R. 35, 55, 93), and the purchases from the Savannah Co. to which they testified were considerably less than the records filed with the Alcohol Tax Unit purported to show (cf. R. 40 with R. 103–105; R. 54–55, 59 with R. 102; R. 65 with R. 103; R. 94 with R. 101). The employee of the Alcohol Tax Unit who produced the records testified that she had no way of knowing whether they were accurate.

She stated that if a purchaser gave a wholesaler another name as that of the buyer, the sale would be recorded as made to such other person (R. 108–110). The court admitted the records (R. 113–114), but charged the jury that they were to be considered only as statements made by such concerns "in the ordinary course of business as to sales," and that they were not to be considered as proof of any specific fact, such as whether the liquors actually were sold or delivered to the person named or whether the quantities and dates of the purported sales were correct; that the jury should give the records "just such weight and credit as you think they are entitled to in determining the guilt or innocence of the defendant" (R. 119).

Petitioner attacks this charge (Pet. 4; Br. 6–7, 12–14) as unduly limiting the evidentiary weight of these reports. There is no merit in this contention. The fact that the records were public records does not endow them with greater evidentiary value than they intrinsically possess. *Greenbaum* v. *United States,* 80 F. (2d) 113, 125 (C. C. A. 9); *Mohawk Condensed Milk Co.* v. *United States,* 48 F. (2d) 682, 685 (C. Cls). These records proved only that the wholesalers reported sales; they did not prove that the sales were in fact made.

3. Some time after the jury had retired they reported that they were unable to agree. In re-

sponse to a question from the judge, the foreman stated that there was a difference of opinion as to whether petitioner had actually purchased the liquor for resale (R. 121). The judge then instructed them that the crime charged was not the purchase by a wholesaler, but the carrying on of the business of a wholesaler without paying the tax. He told the jury that if any one of them was convinced by the evidence that he could not yield, he should stand by his convictions, but encouraged them to consider the case further (R. 120–123). The jury deliberated further and again reported disagreement (R. 124). The court then reminded them that the issue was a simple one and that the only seriously contested question was whether petitioner was acting on his own behalf or as a salesman for others (R. 124–125). In each instance, after giving his supplemental charge, the court asked if there were any exceptions, and counsel for both sides replied in the negative (R. 123, 125).

Petitioner now contends (Pet. 4–5; Br. 7–8, 14–16) that the court's additional charges were unduly coercive and that the court should have directed a mistrial on its own motion. It is well established, however, that a trial judge in his discretion may urge a jury which has reported disagreement to deliberate further in an endeavor to reach a verdict. *Allen* v. *United States,* 164 U. S. 492, 501–502; *Boehm* v. *United States,* 123 F. (2d) 791, 812 (C. C. A. 8), certiorari denied,

315 U. S. 828; *United States* v. *Novick,* 124 F. (2d) 107, 110 (C. C. A. 2), certiorari denied, 315 U. S. 813. The supplemental charge given by the judge was accurate in stating that petitioner did not seriously contest the fact that sales were made and that the only contested issue in the case was the capacity in which he was acting; and, moreover, petitioner took no exception to this instruction. As the court below said, "A defendant may not gamble on the verdict and then secure a new trial if he loses" (R. 140). Cf. *Johnson* v. *United States,* 318 U. S. 189, 201.

4. Petitioner argues (Pet. 5; Br. 8, 16–18) that the payment of a single tax would have authorized him to act as a wholesaler in all the transactions involved and that since all of the sales were made in the Southern District of Georgia, the three indictments, in fact, charged but one offense, and hence that his sentences on all but one count are invalid. However, as the court below pointed out (R. 140), under Section 3278 of the Internal Revenue Code and the Treasury Regulations issued thereunder (see *supra,* pp. 3–4), petitioner was required to pay the special wholesaler's tax at each place where he sold liquor (R. 140). While there was evidence that petitioner stored some liquor at a warehouse in Savannah, the record supports the statement of the circuit court of appeals, which petitioner disputes (Br. 17), that he "had no business location at which orders were

accepted" (R. 140.) The evidence establishes that petitioner traveled about getting orders, in some instances making deliveries at the same time, and in others having deliveries made later by persons whom he hired for such purpose. Only occasionally would customers take delivery from the warehouse where petitioner stored his liquor. (See *supra,* pp. 5–6.) Petitioner was, therefore, liable for payment of the special tax at each place where the sales were consummated. Hence, the five counts of the indictments alleging sales at different times and places were predicated upon separate violations of Section 3253 of the Code, for which consecutive sentences could validly be imposed.

CONCLUSION

The decision below is correct, and the case presents no conflict of decisions or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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